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In the

Supreme Court of the United States

October Term, 1963

No. 294

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinion Below	1
Question Presented	1
Constitutional Provisions Allegedly Involved	2
Statement of the Case	2
Argument	10
I. Unauthorized Physical Penetration Into Premises Necessary to Bring About the Application of the Fourth Amendment	10
II. Guilt of the Petitioner Established by Other Evidence Than the Conversations Heard by Officer Beach Through the Microphone	18
III. Conduct of Police Officers Did Not Constitute Unreasonable Search and Seizure in Violation of the Fourth Amendment to the Constitution of the United States	20
Conclusion	26

TABLE OF CITATIONS

Cases

Bompensiero v. Superior Court of San Diego County, 44 Cal. (2d) 178, 281 P. (2d) 250 (1955) 24

Brinegar v. United States, 338 U. S. 160 ..... 22, 24

Byrd v. Commonwealth, 158 Va. 897, 900 23

Carroll v. United States, 267 U. S. 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280, 39 A. L. R. 790 (1925) 24

Page

Clinton v. Commonwealth, 204 Va. 275, 130 S. E. (2d) 437 1

Crawford v. United States (Va.), 160 F. (2d) 629 26

Goldman v. United States, 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322 ..... 13, 14, 16, 17, 19, 27

Irvine v. California, 347 U. S. 128 17

Ker v. California, 83 S. Ct. 1623, 10 L. Ed. 726, 728, 373 U. S. 23 ..... 19, 21, 22, 23, 24, 26, 27

Lopez v. United States, 83 S. Ct. 1381 17

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. (2d) 1081 (June, 1961) 21, 27

Morrison v. United States, 262 F. (2d) 449 (1958) 25

N. & W. Ry. Co. v. Haun, 167 Va. 157, 164 23

People v. Cahan, 44 Cal. (2d) 434, 282 P. (2d) 905 20

People v. Fischer, 49 Cal. (2d) 442, 317 P. (2d) 967 (1957) 24

People v. Tarantino, 290 P. (2d) 505 20

Pierce v. Louisiana, 306 U. S. 354 21

Seawell v. U. S., 243 F. (2d) 909 25

Silverman v. United States, 365 U. S. 505, 5 L. Ed. (2d) 734 .. 13, 14 17, 19, 27

Spano v. New York, 360 U. S. 315 21

Thomas v. Arizona, 356 U. S. 390 21

United States v. Goldman, 118 F. (2d) 310, 314 15

United States v. Irby, 304 F. (2d) 280 26

Williams v. United States, 263 F. (2d) 487, 488 24

Wolf v. Colorado, 338 U. S. 325 27

Statutes

Page

Code of Virginia (1950) as amended:

Section 18.1-205 2

Section 18.1-208 2

Constitution of Virginia:

Section 10 20

Constitution of the United States:

Fourth Amendment 20, 21

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PAGE

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OPINION BELOW

The conviction of the petitioner (hereinafter sometimes referred to as defendant) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Clinton* v. *Commonwealth*, 204 Va. 275, 130 S. E. (2d) 437. The judgment was entered on April 22, 1963.

QUESTION PRESENTED

Whether the conviction in a State Court should be reversed by this Honorable Court, where an indeterminable portion of the evidence (conversations) relative to the ob-

servations of a police officer was secured by the use of a microphone stuck (placed against) on a wall of an apartment adjoining the apartment rented by the petitioner and her husband under false names and where she placed a certain female to live the life of a prostitute.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fourth and Fifth Amendments to the Constitution of the United States have been violated.

The respondent denies this.

STATEMENT OF THE CASE

The petitioner was found guilty under a two count indictment of the violation of:

(1) Section 18.1-208, Code of Virginia (1950) as amended, knowingly receiving money from the earnings of a female engaged in prostitution; and

(2) Section 18.1-205 of said Code, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

The convictions were rendered in the Corporation Court of the City of Norfolk on February 26, 1962. There was no opinion rendered by the Judge of that Court and there is no requirement that the trial court makes specific findings and render opinions.

As the petitioner apparently takes the position that the conversations of the occupants of Apartment 103 (rented to the petitioner and her husband) which were overheard by Officer Beach by means of a microphone were essential to the establishment of the Commonwealth's case, it is well to point out that this is not correct. The testimony of

Katherine Taylor, Helen Buckridge and S. N. Edwards independently from that of Officer Beach established the guilt of the petitioner.

The fact that the petitioner had given a false name in registering or in renting the apartment (No. 103) led to suspicion by the police authorities that there may be something wrong about her activities. These suspicions were heightened after the surveillance undertaken by Officer Beach on October 21, 1961, from a point on the street, which indicated a heavy traffic of males and females entering the apartment. Again, on October 23, 1961, the surveillance of the apartment was continued, this time from the adjoining apartment (No. 102). Surveillance from this point continued on October 24 and 26, the petitioner being arrested on the latter date.

The following is a resume of the evidence taken from the record as summarized by counsel for respondent:

> The defendant, Catherine Clinton, on several occasions talked to Katherine Taylor and Helen Buckridge about working for her as prostitutes. The two women agreed to work as prostitutes for the defendant; they were to pay the defendant one-half of what they took in as the defendant would furnish the apartment and the customers.
>
> The defendant and her husband, Harley Clinton, posed as Mr. and Mrs. Charles Morrison and during October 1961 rented the apartment at 9630 First View Street, Norfolk, Virginia, for the purpose of prostitution. The defendant forged the name of Mr. and Mrs. Charles Morrison on the registration slip and made the rent payments (Pages 9, 10). Katherine Taylor and Helen Buckridge both worked in the defendant's apartment as prostitutes and gave one-half of their earnings to the defendant for furnishing the apartment and the customers.

Officer Earl H. Beach of the Norfolk Police Division and fellow police officers were able to keep surveillance on the apartment for several days by being in the adjoining apartment they were able to observe many male visitors to the defendant's apartment who remained for a short time. Officer Beach heard much of the conversation and activity that took place in the defendant's apartment by listening through a medicine cabinet in the adjoining wall. He also used a device that would amplify sounds and also used this device on the adjoining wall, it did not penetrate the defendant's wall. Officer Beach was able to hear the defendant making various arrangements concerning the operation of her house of prostitution. Officer Beach was able to see every one who entered and left the defendant's apartment. He was also able to hear everything that took place within the apartment.

Mr. S. N. Edwards went to the apartment as a customer on October 25, 1961. The defendant was there along with Katherine Taylor and Betty Johnson. The defendant questioned Edwards closely as to where he got the telephone number and who he was. After her interrogation of Edwards the defendant left with the Johnson woman and said that she was going to look for a larger place. The defendant actually went across the street to the parking lot and got into an automobile with her husband and waited.

At this point the police entered the apartment, both Katherine Taylor and Edwards were undressed and preparing to have sexual relations with each other. The police entered the apartment without a warrant as they had reasonable grounds to believe that a felony and a misdemeanor were being committed in their presence.

The following excerpts from the testimony of Officer Beach embrace the only description of the hearing device and how it was used:

"MR. WHITEHURST:

"Q. Answer how you could hear from the apartment.

"A. Yes, sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sounds so that you could hear it in the other room.

"MR. REID: Spiked device?

"A. Yes, sir; small device."

* * *

"Q. This spike, was it driven in the wall?

"A. It wasn't driven in.

"Q. Stuck in the wall?

"A. Yes, sir.

"Q. In what portion of the apartment was that?

"A. The whole apartment was just one-room efficiency. It would be the wall that was separating the two apartments.

"Q. Was it in the center of the wall, the back of the wall, or what?

"A. No, sir. It would be closer to the front of the house. It would be a little off from the center of the wall."

The record does not disclose a breakdown of the portion of the conversations Officer Beach picked up by means of the hearing device and the portion that he heard through his natural sense of hearing, but the Officer did state definitely that he heard the conversation of the man and woman in the bathroom through the medicine cabinet in his apartment (R. 42, 43).

Omitting the conversations related by Officer Beach, the following is a chronological resume of his testimony (exclusive of the conversations heard):

OCTOBER 21, 1961

1. At 11:10 a.m. a man in a Ford car parked on the Colonial Store lot and looked at No. 9630 First View Street.

2. At approximately the same time a woman, later identified as the defendant, came to the window and waved to the man in the car. The man was later identified as defendant's husband.

3. At 11:35 p.m. (a.m) a white female (identified as Catherine Taylor) went into 9630 First View Street.

4. At 11:30 a.m. a white male went up to 9630 First View Street.

5. At 1:30 p.m. this man came out [of the apartment].

6. At 12 Noon a white female came out 9630 First View Street and went a half block up the street to a bar. She was identified as Betty Johnson.

7. At 1:30 p.m. a white female (the defendant) came out the apartment and got into an automobile bearing a Virginia license.

8. At 2:15 p.m. Harry Clinton, the defendant's husband, came back and parked his car on the lot and went into the apartment.

9. At 3 p.m. a white male came out the apartment, got into a car and left.

10. At 3:25 p.m. a white male (identified as Harry Clinton, the defendant's husband) came out the apartment, proceeded to the parking lot and got into his car and sat there.

11. At 3:40 p.m. a white female (the defendant) came out the apartment and left with her husband.

OCTOBER 23, 1961

Officer Beach conducted his operations on that date in and from Apartment 102, which apartment adjoined 103.

1. At 1:00 p.m. the phone rang, which was answered.

2. At 1:20 p.m. the phone rang again and was answered by a woman.

3. At approximately 2:00 p.m. a white male entered the apartment.

4. At 3:00 p.m. this same man left.

5. At 3:05 p.m. the defendant arrived and entered the apartment.

6. The telephone rang at 3:18 p.m. and again at 3:30 p.m.

7. At 4:25 p.m. a white male came up and, after ringing the door bell to Apartment 103, entered the same.

8. After conversing with the defendant this man left.

9. When this man departed, the defendant came out the apartment and stood on the ramp and looked to the north and to the south and returned to the apartment.

OCTOBER 24, 1961

1. Officer Beach arrived at Apartment No. 102 at 1:07 p.m. He heard shoes fall to the floor and movements on the daybed.

2. At 1:16 p.m. a man and a woman (Apartment 103) went into the bathroom. The officers ascertained this by placing his ear upon the medicine cabinet in the bathroom of Apartment No. 102.

3. At 1:27 p.m. a white man left the apartment.

4. At 1:35 p.m. a white female (identified as Catherine Taylor) left the apartment.

5. At 2:25 p.m. the defendant arrived and entered the apartment. A conversation between the defendant and one of the women in the apartment ensued.

6. At 2:28 p.m. the phone rang.

7. At 2:37 p.m. a girl identified as Betty Johnson came out the apartment and met the defendant's husband, Harry Clinton—obtained a package from him and brought the package to the apartment.

8. At 2:44 p.m. the telephone rang in the apartment and was answered [by the defendant].

9. At 3:27 p.m. the phone rang again and was answered [by the defendant].

10. At 3:30 p.m. the phone rang again and was answered [by the defendant].

11. At 3:40 p.m. Harry Clinton, the defendant's husband entered the apartment.

12. At 3:49 p.m. the phone rang and was again answered [by the defendant].

13. At 4:00 p.m. the phone rang again and was answered [by the defendant].

14. At 4:07 p.m. the defendant and her husband, Harry Clinton, left the apartment together.

OCTOBER 26, 1961
(Observations made from Apartment 103)

1. At 10:34 a.m. a white male entered the defendant's apartment.

2. At 10:45 a.m.—"you could hear a man and woman up against the wall where the sofa was" and "all you could hear was springs in the daybed squeak."

3. At 10:54 a.m. a man arrived [entered the apartment].

4. At 11:25 a.m. another man arrived at the apartment (later identified as Mr. Edwards).

5. At 11:26 a.m. the defendant arrived and remained five or ten minutes.

6. The defendant left the apartment with Betty Johnson and proceeded to the parking lot where they were arrested by Officer Beach together with Harry Clinton.

All of the above was observed by Officer Beach through his natural senses of sight and hearing. It is submitted that these facts ascertained by him and the knowledge that the apartment was rented by the defendant and her husband under an assumed name constituted probable cause that a misdemeanor was being committed in the petitioner's apartment and thereby justified the officers in entering the same and making the arrest of the occupants thereof found in an undressed condition preparing or engaging in sexual relationship.

ARGUMENT

I.

Unauthorized Physical Penetration Into Premises Necessary To Bring About the Application of the Fourth Amendment

The petitioner argues on pages 7, 8, 9 and 10 of her brief that there was a physical penetration into the premises occupied by her. The evidence in this case does not bear out this contention. The hearing device used by the officer was not described to any extent. The petitioner assumes that the spike on the device was driven into the wall to the extent that an unlawful trespass was effected. She also assumes that the spike was driven into the common studding to which the wall boards were fastened. There is no evidence of this whatsoever in the record. The evidence does not disclose the character of the wall, whether it was solid or made of common studding.

Petitioner seeks to establish the erroneous assumption that the spike attached to the microphone was driven into the common studding from a quotation (on page 3 of her brief) from the work of Dash, Knowlton, Schwartz, "The Eavesdroppers," in its section on tools, page 341, the inference being that the so-called "spike mike" could not pick up the sounds unless same was driven into the common studding between the wall of the petitioner's apartment and the apartment occupied by Officer Beach and therefore the spike attached to the microphone was actually driven into the common studding. The following correspondence with Dr. Richard F. Schwartz disproves this assumption:

"October 29, 1963

"Dr. Richard F. Schwartz
"Assistant Professor
"Moore School of Electrical Engineering
"University of Pennsylvania
"Philadelphia 4, Pennsylvania

"Dear Dr. Schwartz:

"The writer has examined with great interest the work entitled 'The Eavesdroppers' of which you are a co-author. This office is interested in a case involving the use of electronic equipment where the premises of the defendant were invaded by officers after information was obtained through a hearing device commonly known as a spiked mike which was 'stuck' on a wall. On page 341 of your book you describe the use of 'contact mikes' and state that their use is limited to where the spike is driven into the common column to which the lathe or wall board is fastened. In your work you do not describe the so-called detectophone which the writer understands is leaned against the wall and can detect a conversation carried on in a adjoining room. Is there any difference between this and the spiked mike where the spike is not driven into the common studding?

"With high regards and best wishes, I am

"Sincerely yours,

"/s/ D. Gardiner Tyler
"Assistant Attorney General"

DGT:MVH

"31 October 1963

"Mr. D. Gardiner Tyler
"Assistant Attorney General
"Commonwealth of Virginia
"Office of Attorney General
"Richmond, Virginia

"Dear Mr. Tyler:

"This is in reference to your letter of 29 October 1963 concerning eavesdropping with a concealed microphone.

"I have heard the term 'detectophone,' but I do not personally know how it is similar to or different from other types of wall microphones. The main point I was making in my work of several years back was that the presence of a 'dead' air space between walls might hinder the transmission of sound to a microphone located on the side opposite to the source of sound. It is impossible to say that this would always prohibit any sound transmission. Nevertheless, the 'cushioning' of an air pocket would be largely negated if common studding were used. If a situation did exist where a spiked microphone was ineffective, it is very likely that any other type microphone would be equally ineffective.

"I trust this answers your question. If there is any other way I may help you, please do not hesitate to write.

"Very truly yours,

"/s/ Richard F. Schwartz
"Associate Professor of
"Electrical Engineering"

RFS:sbb

The Virginia Supreme Court of Appeals concluded that "the record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration of the premises occupied by the defendant.'" The decision of the Virginia Court is not in conflict with the views expressed by this Court in *Silverman* v. *United States*, 365 U. S. 505, 5 L. Ed. (2d) 734, but is in accordance therewith. In that case, the evidence clearly showed that the spike attached to the microphone penetrated the party wall sufficiently to make contact with "a heating duct servicing the house occupied by the petitioner thus converting their entire heating system into a conductor of sound." It is manifest from the concurring opinion of Mr. Justice Clark and Mr. Justice Wittaker (305 U. S. 513) that the decision in *Silverman* is based on the premise that there was in fact "an unauthorized physical penetration into petitioner's premises." The majority opinion is of the same purport:

> "It [the decision] is based upon the reality of an actual intrusion into the constitutionally protected area." (365 U. S. 512)

The word "intrusion" is defined by Webster's International Dictionary as follows:

> "*Law.* The entry of a stranger, after a particular estate or freehold is determined, before the person who holds in remedial or reversion has taken possession; hence, the act of lawfully entering upon, seizing or taking possession of, the property of another, as in trespassing upon crown lands, in the usurpation of an office."

In the case of *Goldman* v. *United States*, 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, the Court held that placing

a detectophone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment. There, as here, in the case at bar, there was no physical encroachment within the constitutionality protected area. The device used in the case at bar was more akin to the detectophone than the so-called "spiked mike" used in the *Silverman* case. The Court, in that case, refused to re-examine the *Goldman* case but pointed out whether or not there was a physical invasion of the defendant's premises is the vital factor in determining the validity of the evidence thereby secured. If there is an unlawful physical invasion of the defendant's premises in order to obtain the evidence, then the Fourth Amendment is violated; otherwise not. The Court, in the *Silverman* case, makes clear the distinction between the two cases. We quote from its opinion (365 U. S. 510):

> "The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in Olmstead v. United States, 277 U. S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 A.L.R. 376. In holding that the wire-tapping there did not violate the Fourth Amendment, the Court noted that '[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched.' 277 U.S. at 465.
>
> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the

petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent."

In the case of *United States* v. *Goldman,* 118 F. (2d) 310, 314, the Court aptly stated:

"Nor was any error committed in denying Schulman's motion, in which the Goldman's did not join, to suppress the evidence obtained by government agents by the use of the detectaphone and allowing it to be introduced at the trial. Nothing was obtained as a result of any secret entry of Schulman's office. No trespass upon his premises in any way helped to obtain the evidence. The situation was legally no different from the use of an amplifier of sound to overhear conversation not otherwise audible to the listener as for instance, the use of a common aid to hearing by a person somewhat deaf. No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934, c. 652, 48 Stat. 1046, 1103, 47 U.S.C.A. §605, as construed in Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307. There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy. Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception. Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376. Compare, United States v. Feldman, 3 Cir., 104 F.2d 255; and Smith v. United States, 4 Cir., 2 F.2d 715."

In affirming the judgment of the lower court in the case of *Goldman* v. *United States,* 316 U. S. 129, 135, in passing on the question of whether the use of the detectaphone by Government agents was in violation of the Fourth Amendment, the Court stated:

> "We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.
>
> "In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in Olmstead v. United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376. They argue that the case may be distinguished. The suggested ground of distinction is that the Olmstead Case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the constitutional guaranty and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead Case.
>
> "The petitioners ask us, if we are unable to distinguish Olmstead v. United States, to overrule it. This we are unwilling to do."

To say that the use of electronic devices which enable a listener to pick up conversations emanating from adjoining

property where there is no physical pentration of the premises (a trespass) occupied by those conversing should be prohibited is not sound. In drawing the line in the *Goldman* and *Silverman* cases, *supra*, as this Court has done, refusing to impose the exclusionary rule where there is no actual physical penetration, is sensible and logical.

Surely, the officer [occupant of the adjoining apartment] violates no law or constitutional provision when he listens with his own ears to conversations emanating from the other room or apartment and using what he hears as evidence in a criminal prosecution. Does he violate the law if he places his ear against the wall of his own apartment? Does he violate the law if he wears a hearing aid? Does he violate the law if he places a microphone against the wall of his own apartment? Does he violate the law when he sticks this microphone on the wall of his own apartment? Does an officer violate the law by observing the activities of persons from a point outside the physical limits of the property of those persons? Does an officer violate the law if he uses a flashlight (electronic device) to aid him in making such observations? To ask these questions is to answer them. If the evidence collected in such ways cannot be used in criminal prosecutions, then the enforcement of criminal law in this country will be severey handicapped.

This is not a case where the microphone was placed in the petitioner's apartment as was condemned in the case of *Irvine* v. *California*, 347 U. S. 128, although this Court did in fact affirm the conviction in that instance. Petitioner relies on the dissenting opinion in the recent case of *Lopez* v. *United States*, 83 S. Ct. 1381, for a basis for this Court to reverse the holding of the *Goldman* case, *supra*. The *Lopez* case has little or no relevance to the *Goldman* case.

The factual situation is different. This Court did permit the recordings of a conversation to be considered in evidence. The recordings were taken down by a tiny wire recorder lodged in the pocket of the detective while he conversed with Lopez in Lopez' private office. The only similarity with the case at bar is that in both cases there was no trespass or unauthorized physical penetration of the defendant's premises, and an electronic device was used. In one case (the case at bar) to amplify the sounds (conversations) and the others (Lopez) to record the conversations.

> "Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener. . . ." (118 F. (2d) 310)

A person who discusses her arrangements concerning the operation of a house of prostitution contrary to the laws of Virginia must take the risk of being overheard and the risk of what is overheard used against her in a criminal prosecution.

II.

Guilt of the Petitioner Established by Other Evidence Than the Conversations Heard by Officer Beach Through the Microphone

We have heretofore narrated the evidence which Officer Beach observed through his natural senses of hearing and sight. Such was sufficient to make him believe that a crime was being committed in the adjoining apartment and thus establishes probable cause to enter the adjoining apartment without a search warrant. This evidence, independently of the conversations picked up by the officers in using the microphone and the testimony of Edwards, Taylor and Helen Buckridge, all of whom testified on behalf of the

Commonwealth, was sufficient to establish the guilt of the petitioner beyond a reasonable doubt. In both the *Silverman* and *Goldman* cases, the conversations heard by the officers were essential as evidence to establish the guilt of the accused. In other words, the case for the prosecution depended upon such evidence. Here the situation is entirely different. The evidence which petitioner sought to have the Court exclude was not necessary to the establishment of the guilt of the accused.

In affirming the judgment of the lower court, the Supreme Court of Appeals of Virginia determined that the evidence was sufficient to sustain the guilt of the accused, although this particular contention was not stressed by the petitioner before that court. This Court has held that it must examine for itself the facts and findings and the record to determine whether or not the constitutional rights of an appellant have been violated. *Ker* v. *California,* 83 S. Ct. 1623, 10 L. Ed. 726, 728, 374 U. S. 23. The only error asserted by the petitioner in this Court is the failure of the trial court to exclude the testimony of Officer Beach.

If this Court will disregard the entire testimony of Officer Beach and examine the testimony of Catherine Taylor (R. 16, 27) and of Helen Buckridge (R. 28, 33) it will see that this evidence convincingly and overwhelmingly establishes the guilt of the petitioner of COUNT ONE of the Indictment (violation of Section 18.1, Code of Virginia (1950), as amended) receiving money from the earnings of a prostitute.

If the Court will disregard the entire testimony of Officer Beach and examine the testimony of Porter (R. 9, 10), of Edwards (R. 11, 16), of Catherine Taylor (R. 16, 27) and of Helen Buckridge (R. 28, 33), it will see that this evidence convincingly and overwhelmingly establishes the guilt of the petitioner of COUNT TWO of the Indictment of the violation of Section 18.1-205, Code of Virginia (1950) as amended—placing a female in a house of prostitution.

In the case of *People* v. *Tarantino,* 290 P. (2d) 505 (Cal.), evidence was obtained by the use of a microphone hidden in the defendant's office by the police. The California Supreme Court had ruled shortly before in *People* v. *Cahan,* 44 Cal. (2d) 434, 282 P. (2d) 905 (1955), that such evidence could not be used. The prosecution contended that the admission of the evidence did not result in a miscarriage of justice, there being sufficient evidence independent of that obtained through the means of the microphone. In passing on this point, the Court stated:

> "As to Count 2 it appears to us that the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt, and, for the reasons hereinafter more particularly stated, we conclude that the verdict on this count should not be disturbed."

III.

Conduct of Police Officers Did Not Constitute Unreasonable Search and Seizure in Violation of the Fourth Amendment to the Constitution of the United States.

Section 10 of the Virginia Constitution is as follows:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

The Fourth Amendment to the United States Constitution is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable*

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Italics supplied)

As the privacy of an individual and the sanctity of his home is one of the fundamental bulwarks upon which this Republic was founded, we find that the courts have decided literally hundreds and hundreds of cases involving this subject. Until the decision of the Supreme Court, in the case of *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081 (June, 1961), the courts of Virginia were not primarily concerned with the legality of the search and seizure as a prerequisite of receiving evidence procured as a result thereof. However, now it is essential that the courts determine from the circumstances surrounding the search and seizure with or without a warrant whether the same was legal.

As this Court has held in cases involving constitutional rights, an independent examination will be made so the Court can determine for itself whether the Constitution has been violated. We have heretofore in this response quoted at length from the record and summarized the evidence in connection with the circumstances leading up to the arrest of the petitioner and the entry of the police officers into her apartment where they arrested a man and a woman prepared for sexual intercourse. *Ker* v. *California, supra; Spano* v. *New York,* 360 U. S. 315; *Thomas* v. *Arizona,* 356 U. S. 390; *Pierce* v. *Louisiana,* 306 U. S. 354. As the record discloses, no objection was made by the petitioner to the introduction of the testimony of S. N. Edwards (R. 15) and of Katherine Taylor (R. 23) which embraced the activities taking place in the apartment when the officers entered. Although Captain Grant and Ser-

geant Pugh of the Norfolk Police Department actually entered the apartment and apparently arrested Edwards and Catherine Taylor, neither testified as to what they observed in the apartment (R. 46, 47). Captain Grant who with other officers handled the investigation was not asked whether he had a search warrant. Officer Beach, who arrested the petitioner immediately after she had left the apartment, did not have a warrant to make the arrest. He stated that he did not know of anyone having a search warrant (R. 44). He did state, however, that he heard the officers knock on the door of the apartment and say "Police officers. Open the door" (R. 44). As Captain Grant handled the investigation with other officers (R. 46), it is reasonable to assume that the fact and circumstances disclosed by the surveillance made by Officer Beach were transmitted to him "that this information was hearsay does not destroy its role in establishing probable cause." *Ker* v. *California, supra. Brinegar* v. *United States,* 338 U. S. 160.

The arrests made by Officer Beach, Captain Grant and Sergeant Pugh were lawful. There is no requirement in the Fourth Amendment or elsewhere in the Federal Constitution that there must be a search warrant before there can be a lawful search or seizure. True, a search warrant is good evidence that probable cause exists, but same is not conclusive. Where the facts indicate the search warrant was issued without probable cause, courts will hold that the search is in violation of the constitutional prohibition. This is certainly true in Virginia. Considering all the facts and circumstances surrounding this case, how could it be said that the search was unreasonable?

As the officers had probable cause to believe that a house of prostitution was being maintained in the said apartment, they had a right to arrest and make the search because they

had probable cause that a felony had been committed or was being committed. The law in Virginia is clear on this subject. After quoting many authorities, in the case of *Byrd* v. *Commonwealth*, 158 Va. 897, 900, the Court stated (p. 902):

> "From this it appears that an arrest without a warrant is lawful, (1) where a felony has been committed, (2) where it is being committed, (3) when it is about to be committed, (4) when a misdemeanor is committed in the presence of an officer, and (5) where a breach of the peace is imminent."

Likewise, this Court, in the case of *N. & W. Ry. Co.* v. *Haun*, 167 Va. 157, 164, stated:

> "It is the duty of a police officer to make an arrest, without a warrant, for a misdemeanor committed in his presence."

A search incident to a lawful arrest is valid. The arrests were lawful in this case as the felony had been committed or was being committed.

In this respect, the separate opinion issued in the case of *Ker* v. *California*, *supra*, should be considered (10 L. Ed. (2d) 726, 739):

> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' *Brinegar* v. *United States*, 338 U. S. 160, 175, 176, 93 L. ed. 1879, 1890, 69 S. Ct. 1302 (1949), quoting from *Carroll* v. *United States*, 267 U. S. 132, 162, 69 L. ed. 543, 555, 45 S. Ct. 280, 39 ALR 790 (1925); accord, *People* v. *Fischer*, 49 Cal. (2d) 442, 317 P. (2d) 967 (1957); *Bompensiero* v. *Superior Court of San Diego County*, 44 Cal. (2d) 178, 281 P. (2d) 250 (1955)."

A search without a warrant is lawful. Again referring to the separate opinion in the *Ker case* (10 L. Ed. 726, 742), we find this statement:

"The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v United States, 275 US 192, 72 L ed 231, 48 S Ct 74 (1927); Harris v United States, 331 US 145, 91 L ed 1399, 67 S Ct 1098 (1947); Abel v United States, 362 US 217, 4 L ed 2d 668, 80 S Ct 683 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal L Rev 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v United States, supra (275 US at 198, 199); United States v Rabinowitz, supra (339 US at 61); cf. Agnello v United States, 269 US 20, 30, 31, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."

In *Williams* v. *United States*, 263 F. (2d) 487, 488, the Court stated:

"The Fourth Amendment prohibits unreasonable search. A search is unreasonable unless authorized by a valid search warrant, is incident to a valid arrest, or

is made in exceptional circumstances which dispense with the need for a search warrant." (Cases cited)

In the case of *Morrison* v. *United States*, 262 F. (2d) 449 (1958), the search of the house of the accused was made about two hours after the commission of the alleged crime. Judge Prettyman, speaking for the Court, stated:

> "Without attempting to sort out the precise critical factor in each one of the great welter of decided cases, let us come directly to the point. The *necessities of the moment* make the difference between legal and illegal entries in the cases included within our question. For example, in Smith v. United States (103 U. S. App. D. C. 48, 254 F. (2d), 751 (D. C. Cir., 1958), certiorari denied 357 U. S. 937, 78 S. Ct. 1388, 2 L. Ed. 2d 1552 (1958)), a typical narcotics case, the officers sent an informer into a house with marked money, and he returned in a few moments with narcotics but no money. To postpone arrest until a warrant could be sought would, under those circumstances, probably allow the fruits of the crime and contraband to be destroyed. The officers well knew this. We there sustained the entry without a warrant to make an arrest. But no such circumstances existed in the present case." (Italics supplied)

In the case of *Seowell* v. *United States*, 243 F. 2d 909, the Court, on page 912, stated:

> "In the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity, United States v. Di Re, 332 U.S. 581, 589, 68 S.Ct. 222, 92 L.Ed. 210; and in Virginia the general rule prevails that reasonable or probable cause is essential to the validity of such an arrest. United States v. Cotter, D.C.E.D.Va., 80 F. Supp. 590, 592."

In the case of *United States* v. *Irby*, 304 F.2d 280, the Court, on page 284, stated:

> "The Fourth Amendment does not require arresting officers clothed with such authority to procure a warrant of arrest, even if it is practicable for them to do so, but they may act without a warrant if they have reasonable grounds to believe that a felony has been committed or is being committed."

Applying these principles to the case at bar, what were the exceptional circumstances or the necessities of the moment which demanded action on the part of the officers without a warrant? True, the officers had the apartment and activities surrounding it under surveillance for several days before the arrest, but there was no concrete evidence that the crimes were being or had been committed until the officers observed the activities of Edwards and Mrs. Taylor. To have postponed making the search until a warrant could have been secured would have resulted in a defeat of their undertaking—the parties committing the offenses and the object of the search would have disappeared. While the crime was being committed in the presence of the officers, it was necessary for them to act and act immediately. Furthermore, it was their duty to do so. How then could it be said that the search was unreasonable?

The right of search is incidental to lawful arrest. *Crawford* v. *United States* (Va.), 160 F. (2d) 629; *Ker* v. *California, supra.*

Hence, the evidence obtained by the officers in making the search, to-wit, was properly admissible.

CONCLUSION

We do not believe that in the case at bar a "fraction of an inch beyond Goldman" is presented. Nowhere in the

record is there disclosed evidence which shows that the microphone, called "spiked mike" by the petitioner, physically penetrated the premises occupied by the defendant. The doctrine enunciated in the *Silverman* and *Goldman* cases should not be set aside. State searches and seizures should be judged not by the Fourth Amendment but by the flexible concept of fundamental fairness of right to a free system, embraced in the due process clause of the Fourteenth Amendment. *Wolf* v. *Colorado,* 338 U. S. 325. See, Mr. Justice Harlan's opinion in *Ker* v. *California, supra.*

The case at bar is entirely different from the case of *Mapp* v. *Ohio, supra.* There the search was clearly unreasonable and the legality under the Ohio law was indeed questionable, even admittedly illegal. In the case at bar, the search was reasonable, founded upon probable cause and therefore valid under Virginia law and under the doctrines enunciated by this Honorable Court.

From the foregoing, it will be observed that there is no new questions raised by the petition for writ of certiorari. The legal principles have already been determined. It is clear from the Record that the Virginia Court of Appeals followed the criterion established by this Court. Therefore, we maintain that the petition fails to present a substantial federal question.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to Calvin H. Childress, Esq., 342 Law Building, Norfolk 10, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 13th day of November, 1963.

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D. GARDINER TYLER
Assistant Attorney General

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